

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**Appeal from Beaufort County
Honorable Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2016-001779**

THE STATE,

Respondent,

vs.

SHAMEEN COKER,

Appellant.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

WHETHER THE LOWER COURT COMMITTED AN ABUSE OF DISCRETION IN FINDING THE TESTIMONY OFFERED LACKED CREDIBILITY AND IN FAILING TO ADDRESS THE MERITS OF THE CLAIM OF NEWLY DISCOVERED EVIDENCE.

COUNTER STATEMENT OF ISSUE ON APPEAL

Whether the trial judge properly denied Appellant's motion for a new trial based upon after-discovered evidence because the record supports the finding that the evidence offered in support of the motion was not credible – including the recantation by Appellant's co-defendant, fellow gang member and cousin, Arjanal Roach, who had passed a pre-trial polygraph examination in which he said Appellant shot the victim?

STATEMENT OF THE CASE

Appellant, Shameen Coker, is currently serving a life sentence for murdering James Dillard in Beaufort County, South Carolina, on May 17, 2000. The Beaufort County Grand Jury indicted him in February 2001 for murder (2001-GS-07-0171); kidnapping (2001-GS-07-0174); and armed robbery (2001-GS-07-0175). Gene Hood, Esquire, represented him on these charges. Fourteenth Circuit Solicitor Randolph Murdaugh, III, prosecuted the case.

On March 10-12, 2003, Appellant received a jury trial before the Honorable Jackson V. Gregory. The jury convicted him, as charged, and Judge Gregory sentenced him to thirty years for murder and fifteen years, consecutive, for armed robbery. *Tr. pp. 1-263, R. pp. 1-263.*

Appellant timely served and filed a notice of appeal. Assistant Appellate Defender Aileen P. Clare represented him on appeal. Counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967), and petitioned to be relieved as counsel. *R. pp. 348-58.* Counsel raised the following issue “Did the trial court lack jurisdiction to try appellant for armed robbery in Beaufort County, when the robbery occurred in Hampton County?” (*Anders* brief, p. 3). Appellant filed a *Pro Se* Response to the *Anders* brief. *R. pp. 361-68.* In the *pro se* Response, Petitioner raised the following issue: “Did the trial court err in denying appellant’s motion for a directed verdict, when a co-defendant had pleaded guilty and was convicted of the alleged offenses?” (*Pro se* Response, p. 3). On October 20, 2004, the Court of Appeals granted counsel’s petition to be relieved and dismissed the appeal. *State v. Coker*, 2004-UP-528 (Ct. App., October 20, 2004). *R. pp. 346 -47.* It issued the Remittitur on November 22, 2004.

Appellant filed a Post-Conviction Relief (PCR) Application on July 1, 2005 and he supplemented it on March 14, 2006 (2005-CP-07-1215). *R. pp. 281-301; Supplement – R. pp. 308-09.* Respondent made a Return on September 22, 2005. *R. pp. 302-07.* The Honorable

Michael G. Nettles held an evidentiary hearing on April 17, 2008, at the Beaufort County Courthouse. Appellant was present at the hearing and Hector F. Esquivel, Esquire, represented him. *R. pp. 310-38*. On May 13, 2008, Judge Nettles signed an Order of Dismissal denying relief. *R. pp. 339-45*.

Appellant appealed from the denial of his PCR Application. Assistant Appellate Defender Celia Robinson represented him on certiorari. Through counsel, he filed a Petition for Writ of Certiorari (*R. pp. 369-81*), in which he raised the following issues:

1. Did the PCR judge err in denying relief where trial counsel was ineffective in failing to object to the solicitor's referring to petitioner as "the devil" in his closing argument?
2. Did the PCR judge err in denying relief where trial counsel provided ineffective assistance of counsel by failing to object to the State's introduction of irrelevant testimony as to the Folks gang and, having allowed the gang evidence to be introduced against petitioner, by failing to cross-examine the State's witness or to present defense evidence to contradict the erroneous indication that a member of the Folks gang advances through murder?
3. Did the PCR judge err in denying relief where trial counsel was ineffective in failing to make a motion to quash the indictment for murder which failed to state the time and place of the alleged murder with sufficient specificity to provide the notice required by Section 17-19-30?

Petition for Writ of Certiorari, p. 2.

The State thereafter filed a Return to the Petition for Writ of Certiorari. *R. pp. 382-92*. On February 10, 2011, the South Carolina Court of Appeals denied the Petition for Writ of Certiorari. *R. p. 393*. It issued the Remittitur on February 28, 2011.

On July 27, 2011, Appellant filed a *pro se* Petition for Writ of Habeas Corpus, in the United States District Court for the District of South Carolina. *Shameen Coker v. Anthony Padula*, 1:11-01842-RBH. PACER 12-1. Respondent filed a Return and Memorandum of Law in Support of Summary Judgment [PACER 20] and a Motion for Summary Judgment [PACER 19]

on November 18, 2011. The Honorable R. Bryan Harwell, United States District Judge filed an Order granting Respondent's subsequent motion for summary judgment and dismissing the Petition on July 30, 2012. *PACER* 35. Judgment was entered in Respondent's favor on July 31, 2012. [PACER ECF # 36].

With the assistance of Tricia A. Blanchette, Esquire, Appellant filed a Motion Pursuant to Rule 29(b), SCRCrimP, on March 2, 2016. The Honorable Michael G. Nettles held a hearing on this motion on July 11, 2016, at the Beaufort County Courthouse. Appellant was present at the hearing and Ms. Blanchette represented him. Assistant Fourteenth Circuit Solicitor Brian Hollen represented the State. Appellant, Otis Harris, and Arjanal "A.J." Roach testified at the hearing. Appellant also introduced each man's affidavit. *7/11/16 Tr. pp. 9-10; 1-90; R. pp. 413-14*. Judge Nettles denied relief in an "Order Denying Defendant's Motion for a New Trial Pursuant to Rule 29(b). *R. pp. 496-502*."

Appellant timely served and filed a notice of appeal. He filed an Initial Brief of Appellant on February 16, 2017.

STATEMENT OF FACTS

Viewed in the light most favorable to the State, the direct and circumstantial evidence presented at Appellant's 2003 trial reasonably tended to show that on May 19, 2000, Appellant and his co-defendant, Arjanal "A.J." Roach, met up at a mutual friend's residence around 4:30 or 5:00 p.m. After briefly stopping at Appellant's residence, they walked to a Yemassee, South Carolina Chevron station.¹ Once they reached the Chevron station, Appellant told Roach that he was planning to steal an automobile: "he told me he was going to wait till somebody came and

¹ Yemassee, South Carolina, is in Hampton County.

ask for a ride, and then take the car.” Appellant waved a gun while describing his plan. *Tr. pp. 51-55, R. pp. 51-55.*

Roach agreed to help Appellant with the armed robbery, and Appellant handed the gun to him. The victim James Dillard, Jr. (“James” or “the victim”) thereafter pulled up in a red Grand Am.² James went into the store and bought a six pack of Michelob Light.³ When James came back out of the store, Appellant asked him to give Appellant and Roach a ride. James did not know Roach, but he knew Appellant and he agreed to give the men a ride. *Tr. pp. 55-58; 71-72 R. pp. 55-58; 71-72.*

Roach sat in the passenger seat, while Appellant sat behind the victim. They originally travelled in the direction that the victim had been headed, but this changed after Appellant and Roach made eye contact. Roach told the victim to stop and asked if he could drive. “[The victim] told me no, you’re not; and I brandish[ed] the [.38 caliber pistol] and told him to get out, and when he got out on the driver’s side I got out on the passenger side.” *Tr. pp. 58-59; 71-72; 122-27, R. pp. 58-59; 71-72; 122-27.*

Following a brief discussion, Appellant and Roach forced the victim into the trunk of the car at gun point. Roach thereafter put the weapon in the console and drove into Beaufort County. He followed Appellant’s directions to an isolated area off of a dirt road. After they stopped, Appellant grabbed the gun, got out of the vehicle and either he or Roach “pop[ped] the trunk.”

² He was driving a friend’s car. The friend, Ronnie Manigault, testified that he had asked the victim to drive his car home for him because Manigault was not going to get home until later. *Tr. pp. 132-36, R. pp. 132-36.*

³ On May 19, 2000, Alice Morris worked as a cashier at the Yemassee Chevron station. She knew the victim because he was a beer vendor for the store. On May 19th, he came into the store around 6:30 p.m., and he bought orange juice and a six pack of Michelob Light. *Tr. pp. 122-27, R. pp. 122-27.* The store’s surveillance video, State’s Exhibit 5, corroborated her testimony.

Appellant ordered the victim to get out of the trunk and he forced the victim to walk into a wooded or brushy area, at gun point. The victim got on his knees, but Appellant knocked him to the ground by hitting him in the head with the pistol. Appellant then shot the victim several times. *Tr. pp. 59-62; 105, R. pp. 59-62; 105.*

When Appellant returned to the car, Roach told him, "...if he was going to do it, to finish it. He ought not to leave [the victim] like that." So, Appellant and Roach walked over to where the victim was lying. The victim was still moaning, and Appellant shot him in the back of the head, killing him. *Tr. p. 63, R. p. 63.*

Appellant and Roach immediately left the area in the vehicle that they had just stolen, and one of them threw the empty shell casings out of the window. They initially hid the car on a dirt road in Pocotaligo, South Carolina,⁴ and got a ride back to Appellant's trailer in Yemassee. *Tr. pp. 63-64; 103-04, R. pp. 63-64; 103-04.*

Later that night, however, they "caught a ride back to the car" and, after stripping an item off of the car's exterior, they picked up Herbert "Herbie" Ford at his home. The three men then went to a Ridgeland, South Carolina, apartment complex. From there, they returned to Appellant's trailer in Yemassee, parking the car on a nearby dirt road. Later, Roach and Ford went to a Jasper County bar, with a third man. They stayed at the bar until 1:30 or 2:00 a.m. on May 20th, before returning to Appellant's trailer and again secreting the stolen car on a nearby dirt road. *Tr. pp. 65-68, R. pp. 65-68.*

The friends eventually decided that they needed to put the stolen car in water. So, Roach

⁴ "Pocotaligo is an unincorporated community located in northeastern Jasper County, South Carolina, close to the border of Beaufort County. Although historically significant, Pocotaligo today primarily serves as a junction point between U.S. Highway 17, U.S. Highway 17 Alternate and U.S. Highway 21." https://en.wikipedia.org/wiki/Pocotaligo,_South_Carolina.

drove it to a river that was near his Colleton County residence on the 20th. After wiping the steering wheel to remove fingerprints, he drove the car into the river. An acquaintance gave Roach a ride back to Appellant's trailer. That night, he and Appellant drank Michelob Light beers that had been in the stolen car. Roach also drank some Gin, while Ford drank most of the bottle of Gin. *Tr. pp. 68-72, R.pp. 68-72.*

On May 20th, J. B. Kinsey, Jr., a South Carolina Department of Natural Resources diver, found the car in the Cumbee River, at the public boat landing where Roach had submerged it. Officer Kinsey attached a cable to the car and a tow truck pulled it out of the river. *Tr. pp. 137-40, R. pp 137-40.* On May 23rd, SLED Agent Al Stuckey processed the car. He found "numerous items" in the car, including the victim's wallet and identification. He also found two identifiable fingerprints but could not match them to anyone in the case. *Tr. pp. 148-54, R. pp. 148-54.*

Kent Young, the manager of Buckfield Plantation, discovered the victim's badly decomposing body several days later, and he notified the Beaufort County Sheriff's Office. SLED Agent Dianne Bodie testified that she processed the scene where the victim's body had been discovered, and that she found three bullet fragments or bullets underneath the victim's body. She also found a shirt and a Budweiser baseball cap. *Tr. pp. 141-45; 160-71, R. pp 141-45; 160-71.*

A fired bullet and jacket were also removed from the victim's skull at autopsy. The forensic pathologist opined that the cause of death was the gunshot wound to the head. *Tr. pp. 178-81, R. pp. 178-81.* The pathologist further opined that there was at least one gunshot wound to the left thigh. He also found two other holes in the victim's left thigh that were possibly caused by another gunshot wound, but decomposition and animal activity made it impossible for him to be certain. *Tr. pp. 180-81, R. pp. 180-81.*

SLED Agent Dan DeFreese, a forensic firearms examiner, opined that the jacket fragment removed at autopsy (State's Exhibit 19) was consistent with a .38 caliber bullet. He reached the same conclusion for the jacketed bullet (State's Exhibit 16), the shell casing (State's Exhibit 17), and the lead core portion of the bullet (State's Exhibit 18) recovered at the murder scene. *Tr. pp. 187-91, R. pp. 187-91.*

Herbert Solomon Ford testified that he was incarcerated on carjacking charges, in both state and federal court. He received an eighteen year sentence on the federal convictions for carjacking and "attempt to kill." In May of 2000, however, he stayed either with his mother or with Appellant, in Yemassee. On the evening of May 19, 2000, Appellant and Roach came to the trailer with the car that they had stolen from the victim. Several other men were already in the trailer. Appellant told Ford "in street words" that they had shot someone and that they had gotten a car. Appellant, Roach and Ford went out after Appellant had showered. *Tr. pp. 192-96; 199-200, R. pp. 192-96; 199-200.*

Ford also testified he, Appellant, and Roach were members of the Folk Nation gang and that Appellant later told Ford that he had increased his rank in the gang by shooting someone. Appellant told Ford he was now an "OG", Original Gangster. This meant that he had shot someone. *Tr. pp. 196-98, R. pp. 196-98.*

Nineteen year old Michael Curry, Appellant's relative, testified that Appellant told Curry the night of May 19th that he had shot the victim. Curry also testified that Appellant's mother asked him (Curry) to lie to the police and provide Appellant with an alibi for the night of the victim's disappearance and murder. Specifically, she asked Curry to say that Appellant was at the residence of his baby's mother when the shooting occurred. *Tr. pp. 205-09, R. pp. 205-09.*

ARGUMENT

The trial judge properly denied Appellant's motion for a new trial based upon after-discovered evidence because the record supports the finding that the evidence offered in support of the motion was not credible – including the recantation by Appellant's co-defendant, fellow gang member and cousin, Arjanal Roach, who had passed a pre-trial polygraph examination in which he said Appellant shot the victim.

Notwithstanding Appellant's argument to the contrary, Respondent submits that the trial judge properly denied his motion for a new trial based upon after-discovered evidence because the record supports the finding that the evidence offered in support of the motion was not credible – including the recantation by Appellant's co-defendant, fellow gang member and cousin, Arjanal "A.J." Roach, who had passed a pre-trial polygraph examination in which he said Appellant shot the victim.

A. The hearing on Appellant's motion.

Appellant submitted three affidavits in support of his motion. He submitted his own affidavit (*R. p. 484*), one from co-defendant A.J. Roach (*R. pp. 399-401*), and one from former Hampton County Sheriff's Deputy Otis Harris. *R. p. 402*. All three men also testified at the hearing.

Mr. Harris testified that he had worked for the Hampton Sheriff's Department from approximately 2001 until 2006 or 2008. He arrested prosecution witness Herbert Ford after Appellant's 2003 trial, on an arrest warrant for robbery. As they rode to the Sheriff's Department, Ford supposedly asked, "[W]hat was happening with this Coker guy?" Mr. Harris replied that he did not know and did not want to hear about it, but Ford told him about what had happened and said that "they arrested the wrong man" for killing James Dillard. *7/11/16 Tr. pp. 7-9; 11-13; 17; 22-23, R. pp. 411-13; 415-17; 421; 426-27; Harris affidavit, R. p. 402*.

Mr. Harris confirmed that the averments in his affidavit were true. His affidavit and

testimony on cross-examination reflect that Ford told him that "A.J." Roach had shot the victim. He also testified at the hearing that he told Sgt. Sammy White about this statement, but he was hesitant on cross-examination about whether he had done so: "Maybe I told Sammy White about it." 7/11/16 Tr. pp. 9-10; 16-17, R. pp. 413-14; 420-21. 7/11/16 Tr. pp. 9-10; 17, R. pp. 413-14; 421; Harris affidavit, R. p. 402.

On cross-examination, Mr. Harris admitted that he was living in Yemassee; that he now knew some of Appellant's family; that he had been seated with Appellant's family at the hearing; that he worked with Appellant's brother; that both Ford and Sgt. White were dead; and that he did not know either how many times Ford had been interviewed about this case or how Ford had testified at trial. He also reiterated that he had arrested Ford and had the alleged conversation with Ford after Appellant's 2003 trial, and he claimed that he supposedly told "somebody" about this conversation with Ford about six years before his testimony. 7/11/16 Tr. pp. 11-18, R. pp. 415-22.

When asked to explain his delay in coming forward with this story, Mr. Harris denied that he had waited:

I didn't wait on nothing. This has happened a long time ago, and I had told *someone* back then that they said they had the wrong guy, and that's what I had heard, that they had the wrong guy. ... Mr. Ford had told me that in the car taking him to jail that day.

I didn't -- I didn't look for nobody to tell them, so I didn't contact. *The conversation might have come up.* In the conversation, I spoke of it. *I do remember I was speaking to somebody* about it, but I don't know.

7/11/16 Tr. pp. 18-19, R. pp. 422-23. (emphasis added). He also contended that he volunteered the information when someone asked what had really happened. 7/11/16 Tr. p. 21, R. p. 425.

He denied telling Appellant's brother about his conversation with Ford and he could not

explain how Appellant's family learned of it. He merely claimed, "... I told *somebody* what he had done." However, he could not precisely remember when he told this "somebody," other than to say, "It was quite a while back." 7/11/16 Tr. pp. 19-20, R. pp. 423-24 (emphasis added).

Arjanal Roach began his hearing testimony by confirming that he gave a handwritten statement to private investigator Pete Skidmore in July of 2015, and that the typed affidavit he had given to Appellant based on that statement (R. pp. 399-401) was true. 7/11/16 Tr. pp. 25-27, R. pp. 429-31. He then read his affidavit into the record. In pertinent part, he testified that:

My name is [Arjanal] Roach, and I am currently serving twenty-five years for voluntary manslaughter, kidnaping, and armed robbery. This is a statement conceived of and written by me, under no duress or pressure of any kind. I was promised nothing, nor do I wish anything but forgiveness from the wronged parties.

Twelve years ago, I perjured myself in the trial of Shameen Coker when I implicated him in activities that he neither wanted, nor took an active role in.

On ... May 19th, of the year 2000, me and Shameen Coker did cross paths and agree to hang out that night. In hindsight, that may have been the worst decision he ever made. He didn't know it at the time, but I was concealing a pistol on my person, and was anxious to brandish it, if nothing else.

After leaving Shameen's trailer, where we went so that he could change clothes, we ... went to a gas station down the road from his trailer, a Chevron, if I'm not mistaken. At this point, we had no destination, no means of reaching one if we did. We just stood around talking until this red Grand Am pulled up, and an exceptionally tall man, whom I later came to know as James Dillard, stepped out and nodded at Shameen with familiarity before going into the gas station and returning moments later.

To this day, I don't know what made me do it, but upon his return, I asked him if he could give Shameen and [me] a ride. After assuring him that we didn't intend on taking him out of his way, a surprise[d] Shameen and I got inside the car. As we were riding, I asked Mr. Dillard to let me drive, jokingly at first. He took it lightly, because he laughed a little himself. It was at this point when I brandished the weapon. I had no idea why I did it then, and I still haven't a clue now, but I remember thinking that there was no backing out at that point, even though everything that had transpired was spur of the moment. Still holding the pistol, I made Mr. Dillard pull over, pop the trunk, and get inside of it. Shameen was still

in the back seat, stunned into silence. I got behind the wheel, making Shameen get in the front -passenger seat.

I drove to this dirt road that I knew of that had little traffic. I had no clue what I was going to do. I pulled over, just off the side of the dirt road, and went to get Mr. Dillard out of the trunk, still at gunpoint, and led him to the edge of a wooded area. I then shot and killed Mr. Dillard, and ran back to the car in near panic. After I sped away, neither Shameen nor I said a word. He did tell me to take him to his son's mother's house, which I did. That was the end of Shameen Coker's night with me.

Contrary to my testimony, Shameen Coker did not take part in any felonious activity while in ... my company on the night of May 19, 2000. At the time, I was consumed with anger and feelings of betrayal, so I erroneously took it out on Shameen Coker. I regret that I waited twelve years before I emerged with the truth, but again, I have forgiveness from Shameen Coker, his family, and the entire judicial system for misleading them.

7/11/16 Tr. pp. 27-30, R. pp. 431-34. See also Roach affidavit, R. pp. 399-401.

He then recanted specific portions of his trial testimony that implicated Appellant in the murder. He also testified that he did not think trial counsel, Mr. Hood, interviewed him pretrial.

7/11/16 Tr. pp. 30-39, R. pp. 434-43. Roach claimed that when questioned by the Sheriff's Office, the officers played a portion of their interview with Appellant in which Appellant blamed the murder on Roach and Ford, and that this played a role in prompting him to say that Appellant shot the victim. As a result, he gave the affidavit to private investigator Skidmore. *7/11/16 Tr. pp. 25-27; 32; 39, R. pp. 429-31; 436; 443.*

Thus, contrary to his trial testimony, Roach testified at the hearing on the motion for a new trial that he shot the victim, and that Appellant neither played any role in the murder nor knew that Roach was going to kill the victim. In fact, he contended that Appellant remained in the car during the murder. *7/11/16 Tr. pp. 46-47, R. pp. 450-51.*

On cross-examination, he claimed that he had not come forward with a recantation and

that he had contacted Appellant through a mutual cousin.⁵ He decided to recant after talking to “[a] lot of chaplains” and “a couple of Bible study groups.” He admitted that he was scheduled to be released in 2022, but that Appellant had received a forty-five year sentence in 2003. Further, he was aware that Appellant had led Sheriff’s deputies to where a gun had been hidden in the woods and that this weapon was a .38 caliber, which was consistent with the murder weapon. *7/11/16 Tr. pp. 40-44; 52, R. pp. 444-48; 456.*

Roach also admitted that he had never provided a recantation to the Sheriff’s Office when interviewed. He further admitted that he and Appellant had both been incarcerated at Lee Correctional Institution for five years. However, he claimed that they were only in the same dormitory “for maybe a month,” and that they did not speak to one another because he was still mad at Appellant. *7/11/16 Tr. pp. 49-51, R. pp. 453-55.*

Appellant testified that the averments in his affidavit were true. Also and contrary to Mr. Harris’ testimony, Appellant testified that Harris had told his brother that Ford supposedly said that he had not shot the victim. Once Appellant learned this, he contacted his attorney, Ms. Blanchette. He also hired private investigator Pete Skidmore, who obtained an affidavit from Mr. Harris. This was “weeks” or “months” after he had learned about Ford’s statement. *7/11/16 Tr. pp. 54-58, R. pp. 458-62.*

Appellant claimed that he and Roach did nothing more than say hello during the time that they were incarcerated at Lee Correctional Institution. Nor did he have reason to approach Roach until their mutual cousin told his family that he did not have anything to do with the murder and that Roach was sorry for testifying against him. Before Appellant’s discussions with the mutual

⁵ Appellant likewise admitted that they have a mutual cousin. *See 7/11/16 Tr. pp. 56; 59, R. p. 460; p. 463.*

cousin, Appellant thought that it was up to Roach to come forward on his own. *7/11/16 Tr. pp. 58-60, R. pp. 462-64.*

Appellant claimed that he did not shoot the victim and that Roach shot the victim. He further contended that Roach's trial testimony was important to the prosecution's case because Roach did not testify at Appellant's first trial and the first trial resulted in a hung jury. However, Appellant was convicted at the second trial, in which Roach testified. *7/11/16 Tr. pp. 64-66, R. pp. 468-70.*

Appellant admitted that he was interviewed twice by the Sheriff's Office and that he gave differing accounts of where he was when Roach allegedly shot the victim. In his November 30, 2000 statement, he claimed that he was sitting in the car when the shooting occurred. However, in his December 8, 2000 statement, "I told them that I had stepped out the car, I think." The State impeached Appellant's denial of telling officers that he was standing by Roach during the shooting with the transcript of his statement. When the State asked Appellant about Roach's testimony that Appellant never got out of the car, he testified that "[Roach] didn't see me get out of the car" and that Roach "had his back to me." *7/11/16 Tr. pp. 67-70, R. pp. 471-74.*

Appellant admitted on cross-examination that he knew the victim through his brother and that they had seen each other around Yemassee. *7/11/16 Tr. pp. 71-72, R. pp. 475-76.* Appellant also admitted that he and Roach were friends with Ford and that the three friends "used to chill together." He did not know why Ford would lie under oath and implicate him in the murder. *7/11/16 Tr. pp. 72-73, R. pp. 476-77.*

When Appellant denied touching the gun or telling Investigator Bob Bromage, of the Beaufort Sheriff's Office, that he had reloaded the murder weapon, the State impeached him with the transcript of his interview, in which he told Investigator Bromage he had reloaded it. While

Appellant claimed that he did not recall saying that, he admitted that he had exhausted all other appellate remedies and that the motion hearing was his “last chance.” 7/11/16 Tr. pp. 74-75, R. pp. 478-79.

B. The trial judge’s Order denying relief.

After setting forth the case’s procedural history, a factual summary of the evidence at trial and the relevant case law (Order, pp. 1-3, R. pp. 496-98), the trial judge denied relief because he found that Appellant’s evidence was not credible:

The Defendant first presented testimony from Otis Harris. Mr. Harris did not testify during the trial in 2003, so his testimony is the only truly “after-discovered evidence” to support this motion. Mr. Harris’ [affidavit] avers that after the trial of this case, a critical witness named Herbert Ford told him “they have the wrong person for the killing of James Dillard.” Mr. Harris’ affidavit states that he “believe[s] the name he told me was AJ Roach.” He also says that he told another Deputy named Sammy White about this statement, but for unknown reasons waited thirteen years before mentioning it to anyone else. In January 2016, Mr. Harris says he mentioned this statement to the Defendant’s brother, Willie Frazier, with whom Mr. Harris now works

During the hearing, Mr. Harris said numerous times that Mr. Ford made this statement sometime after the Defendant was found guilty at trial. When asked for a more precise time, he stated it must have been after the trial in March 2003 and before he left the Hampton County Sheriff’s Office sometime in 2005. Mr. Ford, however, testified at the trial of this case that he was serving eighteen years in federal prison on a carjacking charge and began serving that sentence at the end of 2001. Therefore, he could not have been arrested and made the statement in question between 2003 and 2005 as Mr. Harris claims. The statement is also in direct contradiction with Mr. Ford’s testimony at trial. When called as a witness, Mr. Ford testified that on the night of the murder the Defendant had a .38 caliber revolver and he was bragging about “getting his OG status,” which Mr. Ford understood to mean he had murdered someone. It is also significant that both Herbert Ford and Sammy White are deceased and cannot validate Mr. Harris’ testimony.

Given the circumstances surrounding the alleged statement, the court does not find Mr. Harris’ testimony credible. Mr. Ford could not have made the statement during the time period claimed by Mr. Harris and his testimony at trial directly contradicted what Mr. Harris claims was said. Furthermore, Mr. Harris’ decision to wait thirteen years before informing anyone of the statement and doing so only

after all other parties are deceased is extremely suspicious and calls into question the truthfulness of his testimony.

If taken at face value, Mr. Roach's testimony may meet the factors as enumerated by [State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)] and necessitate the grant of a new trial. However, this Court is also required to assess the credibility of the testimonial evidence offered by the Defendant in support of his motion.

For a myriad of reasons, this court does not find the testimony of Ajanae Roach credible. In each of his interviews with law enforcement leading up to the Defendant's trial, Mr. Roach identified the Defendant as the individual who shot and killed James Dillard. His testimony in that trial was consistent with each of his prior statements. In 2003, Mr. Roach testified that on the night of the murder he walked with the Defendant to the Citgo gas station in Yemassee where they saw the Victim, James Dillard. Mr. Dillard knew the Defendant's brother and agreed to give both Defendants a ride. Mr. Roach admitted that he pulled out the gun, told the Victim to pull over, and forced him to get into the trunk of the car. It was at this time that the Defendant told Mr. Roach that they needed to kill Mr. Dillard since he knew him and could identify him. The Defendant told Mr. Roach to drive to an isolated area where the Defendant removed Mr. Dillard from the trunk and executed him.

During the evidentiary hearing, Mr. Roach recanted the vast majority of his prior testimony and stated he was the one that killed Mr. Dillard, not the Defendant. His affidavit further states that the Defendant was an innocent bystander who had no idea what Mr. Roach was going to do and never got out of the car during the murder. However, Mr. Roach's recent testimony is inconsistent with even the Defendant's own statements to law enforcement.

During cross-examination at the evidentiary hearing, the Defendant admitted that he lied to investigators when he denied any knowledge of the murder during his initial interview. He also admitted that in subsequent interviews he changed his story multiple times, each time admitting more culpability in the crime. He finally told investigators that he was not only present when Mr. Roach shot and killed James Dillard, but standing right next to him.

Mr. Roach's recent testimony that the Defendant never exited the vehicle while he killed the victim clearly contradicts the Defendant's own admissions and casts substantial doubt on the validity of his testimony. When questioned about this during the evidentiary hearing, Mr. Roach was unable to answer why the Defendant would have admitted to officers he was present for the murder if he never exited the vehicle. He then changed his story and said he could not remember where the Defendant was when the final shot was fired.

During the evidentiary hearing, the Defendant first denied that he told investigators he saw Mr. Roach fire the shot that killed Mr. Dillard. When confronted with his prior statement, he again changed his story. He said that he did, in fact, get out of the car but he stayed in close proximity to the vehicle. He also stated that the victim was close to the road when he was killed so he was able to see everything that was happening from where he stood near the car. This contradicts testimony from the trial that showed the victim's body was found behind a row of bushes and trees approximately 50 feet from the road and not visible from where the car was parked.

As noted above, our courts have frequently stated that recantation testimony is ordinarily unreliable and should be subjected to the "closest scrutiny" when offered as ground for a new trial. [*State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977)]. The recantation of testimony here is not simply a third-party witness, but a Co-Defendant who is attempting to absolve the Defendant of any responsibility in the crime for which he has been convicted. Mr. Roach is also obviously aware that he cannot be tried for the murder of James Dillard since he has already pled guilty for his involvement. He is scheduled to be released in six years and has nothing to lose in now taking full responsibility for the murder. The Defendant, on the other hand, has thirty years left on his sentence and all of his other remedies have been exhausted.

CONCLUSION

After assessing all the evidence, this Court finds that the circumstances surrounding the recantation of Ajanae Roach and the testimony of Otis Harris are unreliable. For the foregoing reasons, the Defendant's motion for a new trial pursuant to Rule 29(b) SCRCrimP is **DENIED**.

Order, pp. 3-7, *R. pp. 498-502* (footnotes added).

C. The trial judge did not abuse his discretion because the record supports his finding that the proffered evidence was not credible.

Rule 29(b), SCCrimP., permits a defendant to move for a new trial based upon after-discovered evidence. "A motion for after-discovered evidence is addressed to the sound discretion of the trial judge," and his decision on whether to grant a new trial will not be disturbed absent an error of law or an abuse of discretion. *State v. Harris*, 391 S.C. 539, 544-45, 706 S.E.2d 526, 529 (Ct. App. 2011) (*citing State v. Irvin*, 270 S.C. 539, 545, 243 S.E.2d 195, 197 (1978)). However, the South Carolina Supreme Court disfavors motions for a new trial

based on after-discovered evidence. *See State v. Needs*, 333 S.C. 134, 158, 508 S.E.2d 857, 869 (1998).

In *Spann*, 334 S.C. at 619-20, 513 S.E.2d at 99, the Supreme Court held that:

In order to prevail in this new trial motion, appellant must show the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

(Citing *State v. Prince*, 316 S.C. 57, 447 S.E.2d 177 (1993)). *See also State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009); *Johnson v. Catoe*, 345 S.C. 389, 393 & n. 1, 548 S.E.2d 587, 589 & n. 1 (2001).

Appellant contends that the trial judge “committed an abuse of discretion when the recantation of Mr. Roach was found to be lacking in credibility and the court prematurely ended his analysis of Appellant's claim.” His claim is based on the premise that the trial judge failed to consider whether Appellant’s affidavit complied with the requirements set forth in *State v. DeAngelis*, 256 S.C. 364, 371, 182 S.E.2d 732, 735 (1971). However, the trial judge’s Order clearly reflects that he considered all three affidavits introduced by Appellant, as well as the testimony of Appellant, Harris and Roach. *See Order*, pp. 3-6, *R. pp. 498-501*.

More importantly, Appellant’s argument ignores what the trial judge correctly recognized: the trial judge was obligated to make a threshold determination of whether the

evidence offered in support of the motion is credible. *See* Order, pp. 2-3, *R. pp.* 497-98.⁶ “In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.” *Mercer*, 381 S.C. at 166, 672 S.E.2d at 565. “The credibility of newly-discovered evidence offered in support of a motion for a new trial is a matter of determination by the circuit judge to whom it is offered. In him, not [the appellate court], resides the power to weigh such evidence; and his judgment will not be disturbed except for error of law or abuse of discretion.” *State v. Mayfield*, 235 S.C. 11, 34-35, 109 S.E.2d 716, 729 (1959). *See also State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977); *State v. Corn*, 224 S.C. 74, 81, 77 S.E.2d 354, 357 (1953); *cf. Clemons v. Mississippi*, 494 U.S. 738, 766, 110 S.Ct. 1441, 1457-58 (1990) (Blackmun J., (concurring in part and dissenting in part) (“The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire”); *Johnson*, 345 S.C. at 400 n. 6, 548 S.E.2d at 593 n. 6 (in case filed in Supreme Court’s original jurisdiction, Court observing that “ ... to decide whether Hess's statement would probably change the result of petitioner's trial, we are required to determine Hess's credibility”).

Contrary to Appellant’s argument, appellate courts have repeatedly affirmed the denial motions for new trial on after-discovered evidence based primarily on the finding that the supporting evidence simply was not credible. *See, e.g., Harris*, 391 S.C. at 545, 706 S.E.2d at 529 (“This issue comes down to a matter of the credibility of the witnesses, which we leave to the trial court's discretion. The trial court found Moyer to be credible. It also found the

⁶ *See* Order, p. 4, *R. p.* 499 (“If taken at face value, Mr. Roach's testimony may meet the factors as enumerated by Spann and necessitate the grant of a new trial. However, this Court is also required to assess the credibility of the testimonial evidence offered by the Defendant in support of his motion”).

circumstances surrounding Moore's recantation as well as Moore's testimony at trial made the recantation unreliable. The record supports the trial court's assessment"); *Johnson*, 345 S.C. at 400, 548 S.E.2d at 592-93 ("We find petitioner has failed to meet the requirement for a new trial that the evidence is 'such that it would probably change the result if a new trial were granted.' We do not believe it is probable a jury would find Hess credible given her prior inconsistent statements"); *Porter*, 269 S.C. at 621-22, 239 S.E.2d at 643; *State v. Deese*, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976) ("When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence"); *Mayfield*, 235 S.C. at 34, 109 S.E.2d at 729. *See also, e.g., United States v. Connolly*, 504 F.3d 206, 213-14 (1st Cir. 2007) (The appellant "place[d] most of his emphasis upon [a co-felon's] jailhouse recantation ... however, [the co-felon's] testimony did not occur in a vacuum ... much of his testimony received substantial circumstantial corroboration."); *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir. 2001) (holding evidence of perjury is weak when it depended on the credibility of two convicted felons); *McCray v. Vasbinder*, 499 F.3d 568, 574 (6th Cir. 2007) (A witness identified the appellant as the murderer at trial, but stated that he could not identify the perpetrator at a later evidentiary hearing. "Reasonable jurors no doubt could question the credibility of this about face from another inmate and rationally could discount his testimony as nothing more than an attempt to keep from being 'pegged as a rat' ").

This is hardly surprising because - as the cited cases make clear - evidence that is not credible generally will not meet the first requirement under *Spann. i.e.*, the evidence is not "such that it would probably change the result if a new trial were granted." *Accord Mercer*, 381 S.C. at 170, 672 S.E.2d at 567 (in upholding denial of relief, Court stated "... we are sensitive to the notion that a mere finding of a witness's lack of credibility does not complete the analysis,

because a witness may lack persuasive credibility and still create reasonable doubt”). Here, the trial judge recognized that the proffered evidence could have warranted relief if it was credible. However, he determined it lacked credibility. *See* Order, p. 4, *R. p. 499* (“If taken at face value, Mr. Roach's testimony may meet the factors as enumerated by Spann and necessitate the grant of a new trial. However, this Court is also required to assess the credibility of the testimonial evidence offered by the Defendant in support of his motion”).

Furthermore, the record supports the trial judge’s findings that Appellant’s evidence was not credible. First, Mr. Harris repeatedly indicated that his alleged conversation with Herbert Ford occurred when he arrested Ford after Appellant’s 2003 trial and while Mr. Harris was working with the Hampton County Sheriff’s Department. His employment with the Sheriff’s Department ended in either 2006 or 2008. *7/11/16 Tr. pp. 7-9; 11-13; 17; 22-23; R. pp. 411-13; 415-17; 421; 426-27.* Harris affidavit, *R. pp. 402-03.* Yet, as discussed in the “Statement of Facts,” Ford testified at the 2003 trial that he was incarcerated on carjacking charges, in both state and federal court, and that he had received an eighteen year sentence on the federal convictions for carjacking and “attempt to kill.” *See Tr. pp. 193-94, R. pp. 193-94.* The online records of the Federal Bureau of Prisons (FBOP) reflect that Ford was not released from federal custody until September 3, 2010. *See* <https://www.bop.gov/inmateloc/>. Thus, the trial judge did not abuse his discretion by finding that it would have been temporally impossible for the conversation described by Mr. Harris to have occurred.

Additionally, Ford testified in 2003 that Appellant told Ford “in street words” that they had shot someone and that they had gotten a car. *Tr. pp. 196-99, R. pp. 196-99.* Ford also testified that he, Appellant, and Roach were members of the Folk Nation gang and that Appellant later told Ford that he had increased his rank in the gang by shooting someone. Appellant told

Ford he was now an “OG”, Original Gangster, which meant that he had shot someone. *Tr. pp. 196-98, R. pp. 196-98*. The trial judge correctly reasoned that the hearsay statement attributed to Ford by Harris was not credible because it was “in direct contradiction with Mr. Ford's testimony at trial.”

Yet another factor supporting the trial judge's finding that Harris' account was not believable is that both Ford and the only person with whom Harris recalled allegedly shared this story, Sgt. Sammy White, were conveniently dead by the time of the hearing. As a result, neither man could confirm or deny what Harris claimed thirteen years after Appellant's trial. Further, Harris denied that he told Appellant's brother about his conversation with Ford and he was unable to explain how Appellant's family learned of it, other than to claim, “... I told somebody what he had done.” *7/11/16 Tr. pp. 19-20, R. pp. 423-24*. This squarely conflicts with Appellant's testimony that Harris had told his brother that Ford supposedly said that he had not shot the victim. *7/11/16 Tr. p. 56, R. p. 460*.

Likewise, the record supports the trial judge's finding that Roach's affidavit and hearing testimony simply were not credible. “ ‘Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.’ ” *Harris*, 391 S.C. at 545, 706 S.E.2d at 529 (*quoting Porter*, 269 S.C. at 621, 239 S.E.2d at 643); *Johnson v. Catoe*, 345 S.C. 389, 400, 548 S.E.2d 587, 593 (2001) (Supreme Court, in a habeas corpus proceeding in its original jurisdiction, subjected recantation testimony to a high level of scrutiny). *See also United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973) (“where a motion for a new trial is based upon recantation of testimony given at the trial, such testimony is ‘looked upon with the utmost suspicion’ ”) (*quoting United States v. Lewis*, 338 F.2d 137, 139

(6th Cir. 1964)).⁷

The current record supports trial judge's finding that Roach's recantation was not credible. First, it is convenient that Ford is now dead and could not again testify against Appellant, Second, although Roach claimed in his original statement to law enforcement that he did not know anything about the murder of James Dillard (*Tr. pp. 75-76, R. pp. 75-76*), he consistently asserted that Appellant had shot the victim and he never admitted that he had done so, in his subsequent statements. *E.g., Tr. pp. 76-78; R. pp. 76-78; 7/11/16 Tr. p. 51, R. p. 455.*

He also testified at trial that Appellant had shot the victim. The trial judge could obviously rely upon this conflict between Roach's recantation and his earlier consistent claims as undermining the credibility of his recantation. *See Order, pp. 4-5, R. pp. 499-500.* Moreover, before the Solicitor felt comfortable in presenting Roach as a prosecution witness, he required Roach to undergo a polygraph examination as to his claim that Appellant shot the victim, and he passed when asked if Appellant was the shooter.

⁷ As one court aptly explained,

The co-defendant who has admitted his guilt and who is awaiting sentencing is concerned with what the sentencing court will do. That very concern is a potent guarantee of trustworthiness. Once sentence is imposed, however, there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame. In these circumstances, the possibility of a successful prosecution for perjury is not a sufficient guarantee of trustworthiness. If the new trial motion is granted, two new trials would be required. If the motion for a new trial is denied, a perjury prosecution would probably require a re-play of the original trial to establish the untruthfulness of the affiant's statements. Most prosecutors do not have the resources to constantly retry the same issues against the identical defendants.

United States v. La Duca, 447 F.Supp. 779, 782-83 (D.N.J.), *aff'd sub nom.*, *United States v. Rocco*, 587 F.2d 144 (3rd Cir. 1978), *cert. denied*, *La Duca v. United States*, 440 U.S. 972, 99 S.Ct. 1537 (1979).

After the jury had returned their verdict and each juror had been polled, the Solicitor stated that:

If Your Honor please, I would like to tell the Court that prior to putting A. J. Roach up as a witness in this case, and I only learned ... last Sunday a week ago - that he was going to be a witness, with him being a Co-defendant, I required, that he be polygraphed. In other words, a lie detector test run.

...[O]f course, a lie detector test is not sufficiently scientifically reliable to be used in Court, but it is an investigative tool and it is a safeguard for my office.

I required that he be asked the question, did Shameen Coker shoot James Dillard, Jr., and his answer was yes, and it showed that he was telling the truth.

I tell the Court that for the benefit of the jurors because this was a difficult case.

As I said, to try the devil you've got to go to hell to get the witnesses, and probably -- I would have preferred to have better witnesses than I had, but I wanted the jury to understand that it happened.

Tr. p. 254, line 10 – p. 255, line 3, R. p. 254, line 10 – p. 255, line 3.

That Roach passed a pretrial polygraph when asked if Appellant shot the victim obviously conflicts with and undermines the credibility of his recantation, given some thirteen years after Appellant's trial. The credibility of the recantation is further undermined by this inordinately long delay in providing it some thirteen years after the trial. *See Komolafe v. Quarterman*, 246 Fed. App'x 270, 272 (5th Cir. 2007) (the credibility of a recantation affidavit was mitigated when it was not submitted until eight years after a conviction), *cert. denied*, 552 U.S. 1168, 128 S.Ct. 1130 (2009). And, rather than give the recantation to law enforcement in the years following Appellant's trial, he gave it to his and Appellant's mutual cousin, in an obvious effort to assist his cousin and fellow gang member.

Also both Roach and Appellant had been incarcerated at Lee Correctional Institution for five years, and Respondent submits that their claims that they did not talk is simply not credible,

particularly since Roach's motivation for implicating Appellant was his supposed anger at his cousin and fellow gang member for implicating him. 7/11/16 Tr. pp. 49-51; 58-60, R. pp. 453-55; 462-64. Each of these factors supports the trial judge's conclusion that the recantation is not credible. See *Harris*, 391 S.C. at 544-46, 706 S.E.2d at 52 (trial judge did not abuse discretion by finding that "the circumstances surrounding [co-defendant's] giving the affidavit recanting his trial testimony, the time when the affidavit was given and [co-defendant's] testimony during the hearing caused it to find the recantation testimony unreliable"); *Clark v. Clarke*, No. 7:14CV00042, 2017 WL 819500, at *7 (W.D. Va. Mar. 1, 2017) ("Clark's submitted affidavits lack credibility and do not offer a compelling claim of actual innocence. Both O'Brien and Washington are felons and former gang members. Further, O'Brien was Clark's childhood friend before they became gang rivals, and Washington is a codefendant that claimed to maintain his innocence, directly contradicting Washington's plea colloquy with his affidavit. The affidavits are also incredibly short, lack any specific details that would bolster their believability, and were written several years after the shootings. Tellingly, Clark does not offer affidavits from any of the other victims or eyewitnesses"); *Drew v. Scott*, 28 F.3d 460, 463 (5th Cir. 1994) (courts "have little confidence in [a codefendant's] postsentencing truth experience because he had nothing whatsoever to lose by incriminating himself after receiving a 60-year sentence") (citing *Drew v. State*, 743 S.W.2d 207, 228 (Tex. Crim. App. 1987)); *People of Territory of Guam v. Quidachay*, 110 Fed. Appx. 745 (9th Cir. 2004) (Testimony of recanting witness was not credible and its admission as newly discovered evidence was not likely to produce an acquittal, as required to warrant a grant of a new trial, where recanting witness was defendant's brother, his story was implausible, his testimony was tentative and his answers to questions unsure, and he had made no previous attempt to implicate an unnamed accomplice); *Martinez v. State*, 917 N.E.2d 1242

(Ind. Ct. App. 2009); *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981).

Further, the trial judge correctly found that “Roach is also obviously aware that he cannot be tried for the murder of James Dillard[,] since he has already pled guilty for his involvement. He is scheduled to be released in six years and has nothing to lose in now taking full responsibility for the murder. [Appellant], on the other hand, has thirty years left on his sentence and all of his other remedies have been exhausted.” Order, p. 6, *R. p. 501*. See also 7/11/16 Tr. pp. 40-44; 52; 74-75, *R. pp. 444-48; 456; 478-79*. Again, a trial judge can properly find that these points undermine the credibility of Roach’s recantation. See *Mayfield*, 235 S.C. at 34, 109 S.E.2d at 729 (trial judge did not abuse discretion by finding that recantation affidavits lacked credibility where one affiant was “an habitual criminal” who was incarcerated with appellant when he gave his affidavit, and another affiant was the appellant’s brother-in-law); *Drew*, 28 F.3d at 463; *La Duca*, 447 F.Supp. at 782-83.

Moreover, Roach testified at the hearing on the new trial motion that Appellant never got out of the car as Roach shot and killed the victim. This “clearly contradicts [Appellant’s] own admissions and casts substantial doubt on the validity of his testimony. When questioned about this during the evidentiary hearing, Mr. Roach was unable to answer why [Appellant] would have admitted to officers he was present for the murder if he never exited the vehicle.” Order, p. 6, *R. p. 501*. See also 7/11/16 Tr. pp. 47-49⁸, *R. pp. 451-53*.

On the other hand, Appellant initially denied telling investigators he had watched Mr. Roach fire the shot that killed Mr. Dillard. When confronted with his prior statement, he again

⁸ Contrary to the trial judge’s finding, Order, p. 6, *R. p. 501*, Roach did not change his account of where Appellant was at the time of the shooting. Instead, Appellant gave inconsistent responses on cross-examination about where he was at the time of the shooting, as discussed shortly. This erroneous factual finding does not warrant relief.

changed his story. He said that he did, in fact, get out of the car but he stayed in close proximity to the vehicle. He also stated that the victim was close to the road when he was killed so he was able to see everything that was happening from where he stood near the car. *7/11/16 Tr. pp. 66-71, R. pp. 470-75.*

Appellant's hearing testimony contradicts Roach's testimony at the hearing, as did Appellant's effort to explain the discrepancy in their accounts: "[Roach] had his back turned to me anyway" and "[Roach] didn't see me get out of the car" and Roach "had his back to me." *See 7/11/16 Tr. p. 70, R. p. 474.* His testimony likewise contradicts trial testimony that "the victim's body was found behind a row of bushes and trees approximately 50 feet from the road and not visible from where the car was parked." *Order, p. 6, R. p. 501. See Tr. pp. 143-45; 164-65; 171-72, R. pp. 143-45; 164-65; 171-72.*

While the State did not introduce this evidence at Appellant's trial, the State established on cross-examination of Roach that he was aware that Appellant had taken Sheriff's deputies to a location where a gun was hidden in the woods and that the weapon was tested. While the results of the testing were not conclusive, the weapon was of the same caliber as the gun used to murder the victim. *7/11/16 Tr. p. 44, R. p. 448.*

Finally, it is not altogether clear that the motion in the present case was timely. Rule 29(b), SCRCrimP provides that "[a] motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of actual discovery of the evidence by the defendant or after the date when the evidence could have been ascertained by the exercise of reasonable diligence." Appellant testified that his brother informed him of Ford's supposed statement to Mr. Harris "[p]robably one or two months" before he obtained Harris' affidavit. *7/11/16 Tr. pp. 57-58, R. pp. 461-62.*

However, the State asked Roach on cross-examination when he decided to contact Coker with the recantation. He testified that “[i]t has to [have] been ... in the last year or so ... [t]hat I made the decision, but ... soon as I came to the decision, I didn’t just go out and do that [(Sic)]. I had to put some things together first.” *7/11/16 Tr. p. 40, line 22 - p. 41, line 8, R. p. 444, line 22 - p. 445, line 8*. Also, by Appellant’s own admission, he made no effort, whatsoever, to discuss the crime with Roach during the five years that they were housed together at Lee Correctional Institution. To the extent that this testimony is credible, it undermines any contention that he exercised due diligence in searching for the recantation evidence. Thus, it is not clear that Appellant’s motion was timely.

Accordingly, based on this record, Respondent submits that the trial judge did not abuse his discretion by denying Appellant’s motion.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that his Court should affirm the judgment and the trial judge’s denial of Appellant’s motion for a new trial.

Respectfully submitted,

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May 16, 2017.

By: 

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ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

Respondent,

vs.

SHAMEEN COKER,

Appellant.

Appellate Case No. 2016-001779

CERTIFICATE OF COMPLIANCE

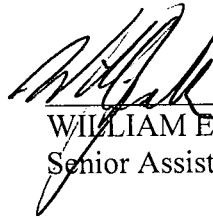
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 16th day of May, 2017.

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SC Court of Appeals



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